IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1392 OF 2004

Shri Appa Bala Patade ... Appellant
(Ori. Defendant No.1)

V/s

Shri Govind Bala Patade
through heirs and ors. ... Respondents

Mr. G.N. Salunke for the appellant.

CORAM: P.V. KAKADE, J.

DATED: 6TH JULY, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Kolhapur, dated 9.1.2004 dismissing the appeal and confirming the judgment and order passed by the Civil Judge, Jr.Divn., Rachanagari dated 19.7.1999 decreeing the suit for partition between the parties and directing separate shares thereof.

2. I have heard the learned counsel for the appellant. Perused the record.

3. The plaintiffs filed the suit for partition of the

ancestral property and separate possession of the shares on the ground that the parties were members of joint family property and the properties involved were of joint family. No partition by metes and bounds were effected and hence he claimed shares in the suit property.

The defendants contested the suit on the ground that there was partition prior to forty years ago and has been under such partition separate holdings were denied and, therefore, the suit for reopening of the partitions once effected cannot be maintainable in law.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that the property was ancestral property and was liable to be submitted for partition. Consequently, the plaintiffs' share was defined as 4/12 share and accordingly the suit came to be decreed for partition and separate possession.

The appeal was carried to the District Court, Kolhapur. The learned Addl. District Judge, Kolhapur, after hearing both parties and on the basis of evidence declined to interfere and dismissed the appeal. Hence

the present appeal.

4. At the outset, it must be noted that there is no substantial question of law involved in this appeal. The learned counsel for the appellant submitted that there was previous partition as can be seen from the record because the parties are in separate holdings of the respective properties and partition was effected by deceased father of the parties 40 years ago and since then the record of rights are entered into according to the holdings of parties which amounts to making partitions. Though it may not be by metes and bounds and, therefore, the suit is for reopening of the said partition and hence not maintainable in law.

6. In support of his argument, he sought to put reliance on the relevant commentary of principles of Hindu Law of Mulla. On perusal of paras 322 and 325 alongwith 233 thereof shows the relevant principles of law regarding presumption as to coparceners and coparcenary property and definition of partition and how it is to be effected. Perusal thereof shows that there cannot be two opinions in this regard. However, the question is, whether mere holdings of uneven shares of the property would amount to effect of partition 40

years ago. For that purpose, reliance was put on behalf of the appellant on the Supreme Court ruling in the case of **Apoorva Shantilal Shah v/s Commissioner of Income Tax, Gujarat, reported in A.I.R. 1983 SC 409,** wherein it is observed that -

> "A partial partition of any joint family property by the father between himself and his sons does not become invalid on the ground that there has been no equal distribution amongst the co-sharers. If, however, any such partial partition causes any prejudice to any of the minor sons and if any minor sons feel aggrieved by any such partial partition, he can always challenge the validity of such partial partition in an appropriate proceeding and the validity of such partial partition will necessarily have to be adjudicated upon in the proceeding on a proper consideration of all the facts and circumstances of the case."

Therefore, it would be necessary that even if the theory of partial partition is accepted, still it would be valid for the plaintiffs to seek justice in the Civil

Court on the ground that prejudice would cause to him in such partial partition. In the present case before us, the evidence on record shows that the separate residences were made of the concerned sharers as they could not live together amicably and, thefore, they became sepoarate in residents. Consequently, with consent of deceased father, holdings were also made separate shares mutated in the revenue records. However, this aspect by itself would not be sufficient to show that there were partitions between the parties in respect of the joint Hindu family property as it would only show intention to live separately but there is no intention to partition the property manifest from the available record.

In view of this position, I am of the view that both the Courts below have rightly taken stand that there were no previous partitions merely because there were separate holdings of the respective shares and hence both the Courts below have rightly held that the suit was required to be decreed for partition and separate possession.

In the result, I do not see any reason to interfere and, as such, the appeal stands dismissed.

. . . . .